Mogana Sunthari a/p Subramaniam v Khadijah bt Yusof & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO MT1–25–41 OF 2008
NORAINI ABDUL RAHMAN JC
28 OCTOBER 2008

Legal Profession — Professional discipline — Suspension from practice — Whether disciplinary board entitled to include appellant as respondent in complaint — Whether decision of disciplinary board made in exercise of the Legal Profession (Amendment) Act 2006 was ultra vires — Legal Profession Act 1976 ss 99(4)(a), 103 D

The first respondent had engaged the firm of Messrs Junaidah, Mogana and Partners ('the firm') to act for her in a sale and purchase agreement ('the SPA'). The appellant and the second respondent were partners in the firm while the second respondent was the solicitor in charge of the first respondent's matter. The firm gave the first respondent a cheque for RM187,200, being the balance of the purchase price due to the first respondent under the SPA, but when the first respondent presented the cheque for payment the firm stopped payment on the cheque. When this situation occurred three times the first respondent wrote a letter of complaint to the Disciplinary Board ('DB'). The DB appointed the Disciplinary Committee ('DC') to conduct an investigation into the complaint. The DC recommended that the second respondent be suspended from practice as an advocate and solicitor for two years and that the appellant be similarly suspended for one year. The DB, pursuant to its powers under s 103D of the Legal Profession Act 1976 ('the 1976 Act') ordered that the appellant be suspended from practice as an advocate and solicitor for 3 years and that the appellant do refund the sum of RM187,200 to the first respondent. This was an appeal by the appellant against the DB's order. In its appeal the appellant prayed for an order that the suspension by the DB be replaced by the one recommended by the DC and that the order of restitution be revoked. It was the appellant's contention that there was no factual or legal justification for the suspension order made by the DB and that there was no legal justification for the restitution order. The appellant submitted that the first respondent's complaint was only against the second respondent who had conduct of the former's matter and that even the DB was aware of this because in its letter dated 7 December 2006 to the first respondent it had declared that since the first respondent's complaint was only against the second respondent the appellant as a partner of the firm

could not be added to that complaint unless a separate complaint was lodged against the appellant. However, later on 1 March 2007 the DB took a conflicting position and wrote to the appellant stating that as the crux of the first respondent's complaint involved the firm's cheque upon which payment was stopped, the complaint would also be against the appellant. In addition the appellant submitted that since the complaint was made before the coming into force of the Legal Profession (Amendment) Act 2006 (the 2006 Act) the decision of the DB in exercise of its powers under the 2006 Act was ultra vires.

Held, dismissing the appeal with costs:

(1) By virtue of s 99(4)(a) of the 1976 Act the DB was entitled to include the appellant as a respondent in the complaint even though it had earlier informed the first respondent that she could not proceed against the appellant (see para 31).

(2) The first respondent's second complaint against the appellant which was made on 2 February 2007 had complied with r 3(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. Following this complaint and the DC's report the DB had exercised its powers under s 103D to impose a greater punishment than that recommended by the DC. Therefore the DB's order was made correctly and within the powers of the DB conferred by the 2006 Act (see para 34).

[Bahasa Malaysia summary

Responden pertama telah melantik firma Tetuan Junaidah, Mogana & Partners ('firma') untuk bertindak bagi pihak beliau dalam satu perjanjian jual beli ('PJB'). Perayu dan responden kedua merupakan rakan kongsi dalam firma manakala responden kedua adalah peguamcara yang ditugaskan dalam perkara responden pertama. Firma telah menyerahkan kepada responden pertama sekeping cek berjumlah RM187,200 yang merupakan baki harga belian yang tertunggak kepada responden pertama di bawah PJB, tetapi apabila responden pertama menyerahkan cek untuk pembayaran, firma telah mengarahkan agar pembayaran dihentikan. Apabila perkara ini berulang sehingga tiga kali, responden pertama telah menulis surat aduan kepada Lembaga Disiplin ('LD'). LD melantik Jawatankuasa Disiplin ('JD') untuk menjalankan penyiasatan terhadap aduan tersebut. JD telah mencadangkan responden kedua digantung daripada beramal sebagai peguambela dan peguamcara untuk tempoh dua tahun dan perayu juga digantung selama satu tahun. LD, bersandarkan kepada kuasa-kuasanya di bawah s 103 Akta Profesian Undang–Undang 1976 ('Akta 1976') memerintahkan perayu

digantung daripada beramal sebagai peguambela dan peguamcara selama tiga tahun dan perayu mengembalikan jumlah RM187,200 kepada responden pertama. Ini adalah rayuan terhadap perintah LD. Dalam rayuannya, perayu memohon satu perintah bahawa penggantungan oleh LD digantikan dengan dengan sesuatu yang dicadangkan oleh JD dan perintah pemulangan sesuatu yang diambil secara tidah sah (restitusi) dibatalkan. Adalah kenegasan perayu bahawa tiada justifikasi fakta dan perundangan untuk perintah pemulangan sesuatu yang diambil secara tidah sah (restitusi). Perayu menghujahkan bahawa aduan responden pertama adalah terhadap responden kedua yang bertindak bagi perkara responden pertama dan LD juga menyedari perkara ini kerana di dalam surat bertarikh 7 Disember 2006 kepada responden pertama ia telah mengesahkan bahawa memandangkan aduan responden pertama adalah terhadap responden kedua perayu sebagai rakan kongsi firma tidak boleh dimasukkan ke dalam aduan tersebut melainkan aduan berasingan dibuat terhadap perayu. Walau bagaimanapun, pada 1 Mac 2007, LD mengambil langkah bertentangan dan menulis kepada perayu menyatakan bahawa aduan pokok respondan pertama melibatkan cek firma yang mana bayaran telah dihentikan, aduan juga melibatkan perayu. Tambahan pula, perayu menghujahkan bahawa memandangkan aduan dibuat sebelum datangnya Akta Profesion Undang-Undang (Pindaan) 2006 ('Akta 2006') keputusan LD dalam menggunakan kuasanya di bawah Akta 2006 adalah melampaui had kuasa.

Diputuskan, menolak rayuan dengan kos:

(1) Menurut s 99(4)(a) Akta 1976, LD berhak memasukkan perayu sebagai responden dalam aduan walaupun ia terlebih dahulu memaklumkan responden pertama bahawa beliau tidak boleh meneruskan terhadap perayu (lihat perenggan 31).

(2) Aduan responden pertama terhadap perayu yang dibuat pada 2 Februari 2007 adalah selari dengan k 3(2) Kaedah Profesyen Perundangan (Prosiding Disiplin) (Tribunal Penyiasatan dan Jawatankuasa Disiplin) 1994. Berikutan aduan ini dan laporan JD, LD telah menggunakan kuasa-kuasanya di bawah s 103D bagi menjatuhkan hukuman berat bukannya sebagaimana dicadangkan oleh JD. Oleh itu, perintah LD telah dibuat dengan betul dan dalam kuasa-kuasa LD sebagaimana diperuntukkan oleh Akta 2006 (lihat perenggan 34).]

Notes

For cases on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1920–1922.

Legislation referred to

Legal Profession Act 1976 ss 99(4)(a), 103C(c)(ii), 103D
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 r 3, 3(2)
Rules of the High Court 1980 O 55, O 92

N Chandran (Rajan Chandran and T Naraendran with him) (A Sivanesan & Co) for the appellant.
Azhar (Hasnan Hamzah) for the first respondent.
Ahmad Zahid (Syed Hussein & Rakan-Rakan) for the second respondent.

Noraini Abdul Rahman JC:

[1] This is an appeal by the appellant for an order that the punishment against the appellant imposed by the disciplinary board ('DB') dated 25 April 2008 be replaced with the disciplinary committee's recommendation ('DC') vide the report of the DC dated 31 October 2007 and that the order of restitution be revoked.

[2] The appeal was by way of originating motion under O 55 and 92 of the Rules of the High Court 1980 filed on 25 August 2008 (encl 1).

[3] The brief facts of the case are as follows.

[4] The first respondent engaged Messrs Junaidah, Mogana and Partners to prepare a sale and purchase agreement relating to a property belonging to her late father and of which she is the administrator. The second respondent was the solicitor in charge of the matter. The first respondent was given three cheques each time for RM187,200 being the balance of the purchase price due to her under the sale and purchase agreement and each time the cheque was stopped payment by the appellant's and second respondent's firm ie Messrs Junaidah, Mogana and Partners.

[5] The first respondent wrote to the DB about the matter. The DB appointed the DC to conduct investigation on the complaint. After having conducted investigation proceeding, the DC submitted the Disciplinary Committee Report (DC/06/2640 and DC/07/2837) to the DB on 12 November 2007 with the following recommendations:

(i) that first respondent (second respondent in this appeal) be suspended from practice as an advocate and solicitor for a period of two years; and

(ii) that second respondent (appellant in this appeal) be suspended from practice as an advocate and solicitor for a period of one year;

under s 103C(c)(ii) of the Legal Profession Act 1976.

[6] Subsequently, the DB made an order as against the appellant as follows:

IN THE MATTER OF A COMPLAINT BEFORE THE
ADVOCATES AND SOLICITORS DISCIPLINARY BOARD
COMPLAINT NO: DC/07/2837 C/R DC/06/2640
BETWEEN
KHADIJAH BINTI YUSOF
COMPLAINANT
AND
MOGANA SUNTHARI A/P SUBRAMANIAM
RESPONDENT
LEGAL PROFESSION ACT 1976 (As Amended)
ORDER UNDER SECTION 103D

In exercise of the powers conferred by s 103D of the Legal Profession Act 1976 s 103D of the Legal Profession Act 1976 (the Act), the Disciplinary Board on 25 April 2008 considered the Report made by the Disciplinary Committee on the complaint against the respondent and upon the hearing the respondent and Mr. Naraendran a/l A Thiagarajah Counsel for the respondent, has ORDERED that the respondent be suspended from practice as an Advocate and Solicitor of the High Court of Malaya for a period of Three (3) years. It was FURTHER ORDERED that the suspension is to take effect twenty one (21) days from the date of this Order and is to expire on 16 May 2001.

The Disciplinary Board has FURTHER ORDERED that the Respondent do refund the sum of RM187,200 to the Complainant pursuant to s 103D(5) of the Act within six (6) months from the date of this Order.

Dated 25 April 2008

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TAN SRI DATO' SERI KHALID AHMAD BIN SULAIMAN
CHAIRMAN
ADVOCATES & SOLICITORS DISCIPLINARY BOARD

[7] At the hearing of this appeal, references were made to the following relevant documents tendered as exhibits in encl 6 and 7. For purposes of easy reference the exhibits are listed below in chronological order.

[8] Letter dated 1 August 2006 by first respondent to the firm of Messrs Junaidah, Mogana and Partners.

[9] Letter dated 11 August 2006 by the first respondent, to the DB complaining about the firms conduct. That letter did not name any advocate and solicitor.

[10] Letter dated 30 August 2006 (hereinafter referred to as the first complaint) by first respondent to DB named the second respondent as the advocate and solicitor handling the first respondents' transaction.

[11] Letter dated 5 September 2006 by the DB to first respondent requesting the first respondent to comply with certain requirements. (These requirements are in compliance with r 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (PU(A) 189/1994).

[12] Letter dated 9 October 2006 by DB to the second respondent asking for explanation to the complaint.

[13] Letter dated 1 November 2006 by the first respondent to DB where the first respondent requested DB to take action against all parties and staff of Messrs Junaidah, Mogana and Partners. She named the appellant as one of those persons.

[14] Letter dated 20 November 2006 by the second respondent is her explanation to DB in reply to the DB's earlier letter dated 9 October 2006.

[15] Letter dated 7 December 2006 by DB to first respondent where part of the letter stated:

> Please be informed that as your letter of complaint and the Statutory Declaration in support of your complaint dated 30 August 2006 was only in respect of Junaidah bt Md Noh, we cannot now add Ms Mogana Sundhari a/p Subramaniam, partner of the firm into your said complaint. You may, however lodge a separate complaint against her in which we will assign a separate complaint number after you have complied with our guidelines to lodge a complaint.

[16] Letter dated 2 February 2007 by the first respondent to the DB where she officially complained against the appellant. (This letter of complaint complied with r 3 of PU(A)189/1994).

[17] Letter dated 23 February 2007 by DB to the appellant requesting her to give her explanation with regard to complaint No DB/06/2640.

[18] Letter dated 1 March 2007 by DB to the appellant where DB stated 'As the crux of the complaint involved your firm's cheque which payment was stopped, the board was of the view that you are also to be named as the respondent in the complaint and to submit your explanation in this matter'.

[19] Letter dated 7 March 2007 by the appellant to DB giving her explanation to complain No DB/06/2640.

[20] Letter 6 April 2007 by the appellant to DB where she enclosed explanation to the second respondent's complaint dated 30 August 2006 and 1 November 2006.

[21] Letter dated 25 April 2007 by DB to the appellant asking for a written explanation of the letter of complaint dated 2 February 2007 against her. This letter also stated 'As we note that this complaint is cross referenced with complaint No DB/06/2640, please confirm if you wish to treat or adopt your explanation to complaint No DB/06/2640 as your explanation to the above complaint'.

[22] Letter dated 10 May 2007 by the appellant to DB (complaint No DB/07/2837) informing the DB that she wished to adopt her explanation for complaint No DB/06/2640.

[23] The main contention of the appellant before the court are as follows:

(a) there was no factual or legal justification for the suspension order made by the DB; and

(b) there was no legal justification for the restitution order.

[24] At the hearing of the appeal, counsel for the appellant submitted that the letter of formal complaint against his client is the letter from first respondent to the DB dated 30 August 2006 (hereinafter referred to as the first complaint). That first complaint is directed against the legal firm of Messrs Junaidah, Mogana and Partners. Counsel also submitted that the letter of complaint from the first respondent to DB dated 2 February 2007 (hereinafter referred to as the second complaint) except for the second paragraph is exactly the same as that contained in the first complaint. Of special importance is the specific reference to the Ref No DB/06/2640. Throughout his submission, counsel kept on referring to this reference number. as being crucial because it showed that there is a connection via that reference to the complaint against his client ie that of the first complaint and not the second complaint. He argued that the second complaint is premised on the first complaint.

[25] Counsel for appellant also argued of the conflicting position taken by the DB vide letter to the first respondent dated 7 December 2006 where it stated that the DB 'cannot now add Ms Mogana Sundhari a/p Subramaniam into your said complaint. You may however, lodge a separate complaint against her in which we will assign a separate complaint number *after you have*

complied with our guidelines to lodge a complaint'. In contrast, the DB later, on 1 March 2007 sent a letter to the appellant containing the following words 'As the crux of the complaint involved your firms checque the board is of the view that you are also to be named as respondent in the complaint ...'.

[26] Submission on the propriety of the suspension order and restitution order, simply put, depends on whether the new provisions under the Legal Profession (Amendment) Act 2006 (Act A1269) applies to the appellant. In other words can the DB exercise the powers under the Act A1269 to the appellant. Counsel argued that it could not.

[27] Counsel for the first respondent submitted that it is the letter dated 2 February 2007 that forms the formal complaint (second complaint) and had complied with r 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. When the second complaint was made, then only a new complaint reference is given ie No DC/07/2837 and because the second complaint was made after the coming into force of the Legal Profession (Amendment) Act 2006 on 2 October 2006, the DB was empowered to exercise the powers conferred on it under the law.

[28] Counsel for second respondent submitted that the DB has taken the necessary step when it made its order on 25 April 2008 and that the order was made in accordance with the Legal Profession Act 1976.

[29] After hearing the submissions, the court is of the opinion that it need to determine the issue of when the complaint was made against the appellant. If the complaint was made prior to the coming into force of Act A1269, then the decision of the DB is ultra vires. If the complaint was made after the coming into force of Act A1269, then the decision of the DB is intra vires.

[30] To make a complaint, a person must comply with r 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. The Director of the Complaints Secretariat shall not register complains that had not complied with the rules. It is for this reason that the 'first complaint' was not registered against the appellant.

[31] On the point that there seem to be a conflict in DB's decision informing first respondent that it cannot proceed against appellant and subsequently it informed the appellant of it's view to include the appellant as a respondent in the complaint, this court is of the opinion that the DB is entitled to do so ie to include the appellant as a respondent in the complaint. Section 99(4)(a) of the Legal Profession Act 1976 provides the following:

A (4) Where a complaint is made against a legal firm, it shall be deemed to be a complaint made —

(a) ...

(b) in the case of a partnership, against all the advocates and solicitors
B who were at the material time, partners of the legal firm.

[32] This court find that the letter dated 2 February 2007 (second complaint) had complied with r 3(2) of PU(A) 189/1994 which provides:

C (2) A complaint shall contain the following —

(a) the full name, identity card or passport number and address of the complainant;

(b) the facts of the complaint;
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(c) copies of any documents that the complainant proposes to rely on in support of his complaint;

(d) the signature of the complainant; and

E (e) the name and address of the complainant's solicitor, if any.

[33] This court hold that the complaint against the appellant was made in the letter dated 2 February 2007.

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[34] Following the finding that the letter of complaint was made on 2 February 2007, the DB after considering the Disciplinary Committee Report, can exercise the powers under s 103D and imposed a greater punishment than that recommended by the DC. This court finds that the
G DB's order dated 25 April 2008 was made correctly and within the powers of the DB conferred by Act A1269.

[35] On reasons as stated aforesaid, this court rules that the appellants' appeal be dismissed with costs.

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Appeal dismissed with costs.

Reported by K Nesan

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